



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Not reportable
Case no: 39/07

In the matter between:

TRANSNET LIMITED

APPELLANT

and

ARLINDO DE ASSIS JANUARIO MAELA

RESPONDENT

Coram: SCOTT, NUGENT, HEHER, MAYA JJA *et* MHLANTLA
AJA

Date of hearing: 22 FEBRUARY 2008

Date of delivery: 27 MARCH 2008

Summary: Two mutually destructive versions - probabilities favouring version of the appellant's witness.

Neutral citation: *Transnet Ltd v Maela* (39/07) [2008] ZASCA 26 (27 March 2008)

SCOTT JA/

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[1] The respondent, who was the plaintiff in the court *a quo*, sued the appellant in the High Court, Johannesburg, for damages arising out of an incident that occurred while travelling as a passenger on a train operated by the appellant. The court was asked to decide only the question of the appellant's liability and to order the remaining issues to stand over for later determination. In short, the respondent testified that he was robbed of his cell phone and money and thrown out of the train by the robbers. He contended that the appellant was liable for damages arising from the injuries he sustained by reason of its failure to prevent the incident from occurring. The respondent's version of what happened was denied by the appellant. A security officer employed by the appellant testified that the respondent had attempted to disembark from the train after it had commenced moving out of the station. Only the two witnesses testified. The trial judge, Msimeki AJ, accepted the version of the respondent, rejected that of the security officer and found the appellant liable for failing to prevent the incident from occurring. Leave to appeal was refused by the court *a quo* but was granted by this court.

[2] Counsel for the appellant attacked the judgment on two grounds. The first was that the court erred in rejecting the evidence of the appellant's witness. The second was that even on the respondent's own version he had failed to establish that the appellant was liable in delict. As to the latter ground, it was conceded on behalf of the appellant (as it was in *Shabalala v Metrorail*¹ where a passenger was similarly robbed on a train) that the appellant owed the respondent a legal duty to act without negligence. The inquiry into the existence or otherwise of such a duty is distinct from and involves different considerations from the inquiry into whether there was negligence or not. What was placed in issue was whether the appellant's employees had acted negligently. In this regard, counsel for the appellant conceded, too, that harm to passengers as a result of criminal activity on its

¹ 157 [2007] SCA.

trains was foreseeable and that the appellant was accordingly obliged² to take such steps as were reasonable to provide for their safety. Counsel submitted that on the respondent's own version he had failed to prove that the appellant had not taken such steps.

[3] Against this background I turn to the facts. On 23 June 2004, sometime after 8 pm, the respondent, a forty two-year old man whose home language is Portuguese, boarded a train at Angelo station with the intention of travelling as far as Benoni station where he proposed taking a taxi to his home in Daveyton. He said that when the train arrived at Dunswart station, being the station immediately before Benoni station, a number of passengers disembarked leaving him and five other passengers alone in the coach. He said that after the train had pulled out of Dunswart station he received a call on his cell phone. After speaking to the caller he put the phone back in his pocket. He said he was then approached by one of the other passengers who addressed him in Sesotho. He replied in isiZulu saying that he did not understand, whereupon the other passenger spoke to him in isiZulu and demanded that he be given the cell phone. When he refused he was punched and thrown to the floor of the coach. The respondent described in some detail how the other passengers then joined the person who had first approached him, how he was robbed of his cell phone and wallet and how he was dragged to the sliding door of the coach, which his assailants forcibly opened while the train was in motion, and thrown out. According to the respondent his head hit the platform, which he believed to be at Benoni station but he said he could not be sure.

[4] Mr Mzobanzi Ceba, a security officer employed by the appellant, testified that on the night in question he was on duty with six other security guards on the 'last train' which left Park station, Johannesburg, at 8.45pm bound for Springs. He said that as the train proceeded away from Johannesburg the stations at which it stopped were, in order; Germiston,

² In *Shabalala v Metrorail* (in para 7) I used the expression 'legal duty' in relation to this obligation, ie the obligation which may or may not arise in response to the second leg of the inquiry into the existence of negligence. Its use in this context is unfortunate. The expression is more appropriate to the inquiry whether negligence should attract delictual liability.

Delmore, Angelo, East Rand, Boksburg, Dunswart, Benoni, New Kleinfontein, Apex, (it missed out Anzac) Brakpan and then on to Springs. He said he was in charge of the other six and their function was to patrol the train with the object of curbing crime. None of them was in uniform. Ceba said he was to go off duty at Brakpan where he had arranged for a colleague to meet him and give him a lift home. Many of the passengers disembarked at Benoni station. Ceba said that at that stage he and the other six security officers were working their way down the train from coach to coach in the direction of the rear of the train. He said that when they reached the second last coach he saw that it was occupied by a single passenger who appeared to be reading. Ceba sat down on a seat about two seats behind the passenger and instructed the other security guards to begin working their way back in the direction from which they had come.

[5] Ceba's account of what happened when the train reached Apex station was shortly as follows. He said that he noticed that when the sliding doors opened, the passenger did not immediately stand up. After a while he did get up, at which stage the train was still stationary, and asked in English if they were at Benoni. He spoke with a foreign accent which Ceba recognised when the respondent testified. Ceba replied that they had passed Benoni which was two stations behind. The passenger moved towards the door. As he did so the sliding doors began to shut. He said to Ceba that he had intended to get off at Benoni and using his left leg he stopped the doors from closing altogether. Ceba shouted at him not to jump and told him to get a taxi from Brakpan, which was the next station at which the train stopped. While he was speaking the train had begun to move and was already accelerating when the passenger squeezed sideways through the doors and jumped, with the doors closing behind him. Using his cell phone, Ceba immediately telephoned his colleague who was waiting for him at Brakpan, telling him of the incident and asking him to go to Apex station to find out what had happened to the passenger whom Ceba suspected had fallen down between the platform and the train.

[6] In the course of cross-examination Ceba was confronted with a written report he had made to his superior officer which was undated but which was received two days after the incident, ie on 25 June 2004. Counsel's object, no doubt, was to draw attention to certain discrepancies between the report and Ceba's evidence. However, the content of the report, made a day or two after the event, is significant. It reads: (without corrections)

'On the 23rd June 2004 I was working crime prevention with national force guards between Germiston and Springs.

In the evening at about 21:35 at Apex station on a third coach from the train guard side I was with one male commuter on the very same coach and this commuter asked me if the station is Benoni and I told him that we had already passed Benoni.

He then quickly went to open the door and I told him that he ill get of at next station which is Brakpan he then said no I am going to Benoni and he jump out and by that time the train was running faster.

When I look through out the window I could not see anything like a human being and I shouted to the guards that there is some body fell between the train and the platform because they were facing opposite direction and sow nothing, but they ignore that.

I decided to phone our shift member (LPO RAKGWADI) and he found the victim on the lying railway line and was seriously injured on the head and right leg was broken and identified him as Mike Mayela of 424 Sigalo street Daveyton with no other documentation.

The paramedics were contacted and the victim was transported to Johannesburg General Hospital. And other references are reflecting on an OB.'

Ceba testified that Rakgwadi had since died. He confirmed that the latter had later that evening reported that he had found a person with serious injuries on the railway line who was identified from the documents he was carrying as Mike Maela of 421 Cigallo Street, Daveyton. It was not in dispute that this person was the respondent.

[7] As previously indicated, the trial judge accepted the evidence of the respondent and rejected that of Ceba whom he found to be 'a poor witness'. In this court counsel for the appellant attacked this finding and submitted that the grounds upon which the judge criticised and rejected the evidence of Ceba were trifling and ill founded. I am constrained to agree.

[8] First, Ceba was criticised for testifying that the incident had occurred in the second last coach whereas in his report he had said it occurred in the third coach from the end of the train. This was described by the trial judge as 'an obvious contradiction'. I regard it as being of no significance, particularly as Ceba readily conceded that what he had said in his report was to be preferred as he wrote it immediately after the event when the incident was fresh in his memory. The trial judge further placed much emphasis on the discrepancy between Ceba's report, on the one hand, and his evidence, on the other, as to how the respondent jumped from the train. In his report (repeated in the plea) it was said that the respondent 'went to open the door' whereas in his evidence Ceba described how the respondent had put his leg between the sliding doors to prevent them from closing. Once again, in the context of Ceba's evidence as a whole this criticism can carry little weight. The report Ceba made after the event was short and cryptic. To write that the respondent 'went to open the door', although not strictly accurate, is much easier than to write a description of how the respondent had stopped the doors from closing. In any event, nothing turns on whether the doors were forced open or forcibly prevented from closing. It is also worth noting that the respondent said in an affidavit he made seven months after the event that 'the train left Angelo train station with its doors open until [he] was thrown through it'. If anything, the discrepancy between this statement and the respondent's evidence that the robbers forcibly opened the doors is more significant.

[9] Ceba was subjected to a somewhat tedious cross-examination during which he was questioned at length as to the precise sequence of events from the time the respondent stood up to the time he jumped from the train and as to what was likely to have motivated the respondent to do what he did. This elicited some uncertainty on the part of Ceba as to details such as whether he shouted at the respondent not to jump once or twice or whether the respondent appeared nervous or not. For this he was heavily criticised. But in my view the criticism was unjustified. The events he was describing took place in a matter of seconds; the uncertainty was understandable. Another criticism levelled at Ceba by the trial judge was the former's failure to tell the respondent that he was a security guard and that it would be unlawful for him

to jump out of a moving train. Here again the criticism is unfair. As I have said, the whole incident took place very quickly and Ceba was hardly afforded the opportunity to advance every reason why the respondent should not jump out of a moving train. In any event, his failure to warn the respondent of the unlawfulness of his conduct was not something that reflected adversely on Ceba's credibility. The same is true of the criticism that Ceba failed to speak to the respondent or 'see the need to search the man' on finding him alone in the coach.

[10] Turning to the probabilities, the trial judge found Ceba's version to be 'highly improbable'. In support of this conclusion the judge said:

'It would have been ludicrous of the plaintiff to jump out of the moving train when he well knew that he could disembark at the next station. The plaintiff was well aware of what would become of him if he jumped out of a moving train. That would be too great a risk to take.'

I am unable to agree. The conduct would admittedly be highly irresponsible, but regretfully such conduct, ie boarding or alighting from a train after it has commenced moving, is anything but uncommon. It is a risk that is frequently taken by commuters either to board a train they would otherwise miss or to avoid being overcarried after realising too late that they had reached their destination. However, what the judge failed to consider at all in his judgment was the improbability of Ceba having fabricated his evidence. There was clearly no reason for him to have done so and the report he submitted to his superiors the next day or the day thereafter contained in substance the account of the incident he described in evidence. His evidence was no recent fabrication.

[11] Ceba stated in his report that the incident occurred at Apex station. The respondent was unable to contradict that this was so. But it could hardly have been false because had it been so the falsehood would not have gone unnoticed, nor could Ceba have thought that it would, if indeed he could ever have had any reason to lie about the station at which the incident occurred. But the respondent's version is inconsistent with him having been thrown out

of the train at Apex station. It is clear from his evidence that the whole incident culminating in him being thrown out of the train was of short duration, perhaps a minute or two. It was also his evidence that he was first approached by one of the robbers after the train left Dunswart station, ie that the robbery took place while the train travelled between Dunswart and Benoni stations. His evidence is wholly inconsistent with the train having stopped at two stations, ie Benoni and New Kleinfontein, and thereafter having reached Apex, while the robbery was taking place.

[12] It follows that in my view not only was the trial judge's criticism of Ceba ill founded but the established facts are consistent with his version and inconsistent with that of the respondent. It is true that the trial judge had the opportunity of observing the two witnesses and their demeanour in the witness box but, as has been stressed both by this court and the Constitutional Court, the truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone. In my view, therefore, the court *a quo* erred in rejecting the evidence of Ceba and the appeal must succeed.

[13] The appellant was represented in this court by both senior and junior counsel. However, I am unpersuaded that the case justified the employment of two counsel.

[14] The appeal is upheld with costs. The order of the court *a quo* is set aside and the following substituted in its place:

‘The action is dismissed with costs.’

D G SCOTT
JUDGE OF APPEAL

CONCUR:

NUGENT JA
HEHER JA
MAYA JA
MHLANTLA AJA